Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 17 *Symposium: Alternative Dispute Resolution Mechanisms to Landlord-Tenant Problems*

January 1979

Housing Court: The New York Tenant Experience

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HOUSING COURT:

THE NEW YORK TENANT EXPERIENCE

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There is common agreement among New York's tenant lawyers that the housing court fails to meet the needs of the people of New York and does not achieve its stated goals of providing safe, decent and habitable housing.[1]

Basic to the failure of the housing court is the inherent adversary nature of landlord-tenant relations that does not readily fit with the informal nature of the housing court and its orientation toward reaching quick settlements. A former administrative judge once said

> it is a court which seeks to arrange a settlement between tenant and owner as soon as possible. It is a place where humanitarian as well as the legal aspects of a contract of letting premises are sought out. The court seeks informality and rehabilitation. It aims to promote conciliation and compromise rather than confrontation, and verily, removal of violations whether of record or no is the name of the game, not imposing penalities.[2]

However well the informality of this "boys' club" approach works for its members, settlements and informal tribunals do not work where parties have unequal power. And nowhere is there greater disparity than in

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1. N.Y. CIV CT. ACT § 110 (McKinney Supp. 1978). *See also* Cohen, *The New York City Housing Court—An Evaluation,* 17 URBAN L. ANN. 27 (1979).

2. E. THOMPSON, CIVIL JUSTICE IN A DYNAMIC CITY 2 (1974).

the landlord-tenant relationship.

While arbitration, mediation, compromise, and settlement might work in a certain kind of forum, we must be skeptical about the alien, hostile surroundings of a "back-up" courtroom presided over by black-robed hearing officers, now called judges, who have been appointed by the Administrative Judge of the court—in effect, their employer. The advisory council through which appointments are processed, is composed largely of members of real estate interests and is not representative of the population; council members are appointed by the same individual who has the discretion to re-appoint the hearing officers. All of these factors have a chilling effect on these "judges" and denies the public of accountable judges.

The housing court has not met its objectives of establishing and maintaining housing standards and the housing stock in a unified forum. In terms of emergency repairs, investigation, enforcement, and hiring of necessary personnel, the city is virtually non-functioning.[3]

Pursuant to statute,[4] the court's objectives are to be accomplished by consolidation of actions related to building maintenance and operation. The statute seeks to employ federal, state and city remedies, programs and procedures, regardless of relief sought, to retain continuing jurisdiction of a building until all violations are removed. All cases and matters are to be tried before hearing officers, now called judges.

Basically, the court's powers include the power to impose and collect civil penalties for violation of *certain* laws, though not all laws, pertaining to housing; reimburse the city for its expenses in correcting certain violations and to obtain liens for the reimbursement; issue injunctions and restraining orders; hear summary proceedings, judgments for rent and evictions, "including without limitation" those cases in which the tenant alleges a defense related to housing conditions; appoint receivers; remove violations; consolidate all actions regarding a building; develop programs; and implead appropriate agencies.

Landlords, the city and tenants (in limited circumstances) have the right to initiate proceedings to correct housing violations. The tenant can petition for imposition of penalties when the landlord has filed a certificate of inspection which the tenant alleges is false and HPD has not inspected; where HPD has refused to issue notice of violation; and where violation has issued and the owner fails to correct it. In these situations

3. *See generally* Rutzick & Huffman, *The New York City Housing Court: Trial and Error in Housing Code Enforcement,* 50 N.Y.U. L. REV. 738 (1975).

4. N.Y. CIV. CT. ACT § 110 (McKinney Supp. 1978).

the tenant can apply to the housing court for an order directing correction and for the imposition of penalties. However, tenants rarely sue. One recent study showed that in 1977, in Manhattan, only fifty-five cases were tenant-initiated.[5]

The real point is, as a past administrative judge stated,

> It is the firm stated policy of this court that rent shall be deposited into court as a condition precedent to the grant of an adjournment on consent beyond the statutory period, or where successive adjournments postpone the trial date beyond the following rental date due, or whenever the litigation gives indication that it will be more protracted than summary.

When money is not being used to maintain the building, there is a real question of why rents should be paid at all. The basic perspective of most landlords' attorneys, judges and hearing officers is that the paramount issue is whether the rent was paid. Tenant representatives are constantly being criticized for asserting due process "technicalities" when "the real issue is the payment of rent."

Everything is done to extract rent, regardless of whether the rent is withheld due to lack of heat, lack of hot water, or the presence of rats. Because very few orders are entered, the landlord is able to have the best of both worlds by adjourning the case saying he will make repairs, but never actually making the repairs. The landlord is not required to put up a bond for the faithful performance of repairs. At the same time, whenever the tenant asserts procedural or substantive rights, the issue always returns to whether the rent has been paid. Informal policy tends to prevent tenant-initiated process or defense unless rent has been paid. In effect, the tenant must pay the rent or relinquish substantial legal and constitutional rights.

What has been done, then, is to treat the landlord-tenant relationship, for some purposes, as non-adversarial, while at the same time getting down to the only real issue ever addressed. Did the tenant pay the rent or not? The court functions merely to expedite rent collection; it is a rent collection agency.

The constant emphasis on conciliation and settlement appears to settle housing issues while actually not resolving them. Some years ago, New York had a short-lived procedure in matrimonial cases which required "conciliation," or a statement that conciliation was impossible between the parties, before a divorce could be granted. That did not work be-

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5. MONITORING REPORT ON THE PERFORMANCE ANALYSIS OF THE NEW YORK CITY HOUSING COURT (1979).

cause, by definition, the parties could not get along. Similarly, tenants in litigation with their landlords do not want conciliation. What they want and need is a decent home. And the housing court does *not* assure that they *have* a decent home. Instead, the denial of due process at every stage of the proceedings has a trivializing effect. The litigant in a housing case has virtually none of the rights as someone who has had a car crash—no jury, no discovery, no elected, publicly accountable judge, no stenographer, no *right* to counsel.

At least fifty percent of the tenants default in proceedings commenced against them. There is good reason to believe that many of these "no-shows" were never served. Those who were served may very well have not been able to read English, particularly legalese, or may actually have been illiterate. These people do not know the nature of the legal process, nor do they have general access to lawyers.

The Legal Aid Society and legal services attorneys are brutally overworked and cannot possibly represent all the people who need their representation. Moreover, as mentioned, there is no right to counsel. In *Matter of Smiley,*[6] a matrimonial case, the New York Court of Appeals clearly established that there is no right to have counsel provided in a civil proceeding because it does not involve loss of liberty. In fact, a very small percentage of tenants are represented by counsel. Significantly, the potential loss is of one's home, shelter and roof.

In *Smiley,* New York's highest court stated that the obligation of the bar and various governments to provide representation to private indigent litigants is discretionary. The court recited the lack of funds argument, but the lack of money is the very point that so heavily weighs the balance of power in favor of real estate interests and against the tenant. According to the majority opinion, there is no obligation of the state to assign, let alone compensate, counsel as a matter of constitutional right.[7] Although that case concerned divorce, the *Smiley* court added that

> among the many kinds of private litigation which may drastically affect indigent litigants, matrimonial litigation is but one. Eviction from homes...and any litigation which may result in the garnishment of income may be significant and ruinous for an otherwise indigent litigant. In short, the problem is not peculiar to matrimonial litigation...[8]

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6. 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975).

7. *Id.* at 440-42, 330 N.E.2d at 56-58, 369 N.Y.S.2d at 92-94.

8. *Id.* at 440-41, 330 N.E.2d at 57, 369 N.Y.S.2d at 93.

The actual proceedings and atmosphere of the housing court closely resemble a three-ring circus. In addition to the calendar part, there are overflowing, mini-courtrooms for housing cases. At the same time, modern and spacious courtrooms are reserved for commercial, tort and criminal cases and often go unused. This is a statement of contempt for the majority of people whose only contact with the judicial-legal system is in housing court. I have heard a hearing officer say, "If there is no room, people must leave." In fact, I have even witnessed a hearing officer tell a litigant to leave—during his own proceedings—because there was no place to sit! Needless to say, these circumstances prevent public access and constitute a denial of rights of the public as well as of the parties involved. During proceedings, a tape recorder substitutes for the statutory requirement of a record. The machine is totally controlled by the hearing officer, who turns it on and off at will. Very little is ever recorded and much is left off the record.

Most of the courtroom discussion involves talk of settlement,[9] with emphasis on whether or not the rent has been paid. In most cases, talk is all that ever happens. During these informal proceedings, rules of evidence and due process are ignored in overt and subtle ways. Hearing officers have been known to hold private conversations with the landlord's attorney at bench, while the *pro se* tenant is excluded.

As one Legal Aid Society lawyer says, "The hearing officers have become immune to the concept of people being damaged. They can no longer relate to people who have no heat and hot water."

Most attorneys actively representing tenants think that without major change the situation is hopeless for their clients. It is almost universally agreed that among the most serious problems are the informality, failure of substantive and procedural due process, hearing officers who are responsible and accountable essentially to only one individual and, of course, lack of maintenance by private and city landlords, lack of code enforcement, failure of contempt as a remedy, and utter disregard for priority needs of people.

People frequently contend that one of the main problems of the Housing Court Act is that it gives administrative judges the authority to appoint hearing officers. Other judges of the civil court are elected and therefore able to assert greater independence in their decision-making. The administrative judge should be prevented from selecting judges or

9. One real estate spokesman praised the housing court for "disposing of thousands of rent proceedings weekly without trial." *Housing Court Justice Gets Bad Grades,* REAL ESTATE FORUM (February 1976).

hearing officers, since this selection process fails to foster judicial independence.

Of paramount importance is not whether the persons presiding are judges or hearing officers called judges, but *who* they are, how they are chosen, to whom they report, how long they sit and how immune they become to the problems. Complete financial disclosure should be mandated to ascertain whether judges are property owners and therefore in a conflict of interests, a situation which should be viewed as totally intolerable.

Although there have been recommendations that the term of office of hearing officers be lengthened, tenant attorneys and others practicing daily in the housing court think that there should be a quicker turn-over than the present five-year term. It is very important that a judge sit for a long enough time to maintain a continuing interest in a particular case, but not so long that the person becomes immune or oblivious to the human aspect of his cases. The preference of tenant lawyers is to have judges rather than hearing officers, and *strictly adhere to rules of evidence, pre-trial and motion practice, provision of counsel and trial by jury.*

Tenants, non-property owners, are caught in an American economic crisis which the housing court will not solve. And it can be argued that this was never its purpose. But, looking at reform, not real substantive change, what lessons can be learned?

One position recognizes that there is no valid, workable purpose in having summary proceedings. Landlord-tenant cases should be resolved by action in ejectment, plenary action for damages, and breach of contract. This approach would recognize that the only thing "summary" in the current procedures are the accelerated actions against the tenant. There are no summary proceedings for repairs. An alternative approach would establish entirely new housing courts. Ideally, I advocate lay community tribunals, but only if there is built-in parity. Initially, I suggest decentralization of this court; locating the courts in the neighborhoods where the property is located; treating code violations as felonies; scheduling housing cases in the evening; permitting parties to be on phone call alert, rather than requiring personal appearances; providing child care facilities; creating simple forms in both Spanish and English;[10] and video taping all hearings.

10. *See* E. GOODMAN, TENANT SURVIVAL BOOK (1972) (available from Riverside Communications, Inc., Suite 2-F, 50 Riverside Drive, New York, New York 10024).

Most important, we must challenge the attitude reflected by the Supreme Court in *Lindsey v. Normet,*[11] when it stated that ". . . the Constitution does not provide judicial remedies for every social and economic ill . . ."[12] The judicial system owes the people of this country more than that.

11. 405 U.S. 56 (1972).

12. *Id.* at 74.